Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GLENDA BRUNETTE,

Petitioner,

v.

THE OJAI PUBLISHING COMPANY, INC., d/b/a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR, an individual,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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98 pp

QUESTIONS PRESENTED

1. Does a private news organization violate the Fourth Amendment when the media exploits law enforcement's exclusive right to enter a private home pursuant to a search warrant by entering, searching and seizing private images by means of photography solely for the media's own purposes under an oral agreement between the media and law enforcement?

2. Does State action for purposes of the Fourth Amendment require more than entry into a private home pursuant to an oral agreement with law enforcement by a private party?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Glenda Brunette ("Ms. Brunette"), an individual.

Respondents: The Ojai Publishing Company, Inc. d/b/a/ The Ojai Valley News, a nongovernment corporate party to the proceedings before the United States District Court for the Central District of California and The United States Court of Appeals for The Ninth Circuit.

Tim Dewar ("Dewar"), an individual.

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PETITION FOR A WRIT OF CERTIORARI

GLENDA BRUNETTE, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This is a dispute over the meaning of the Fourth Amendment to the United States Constitution which was the subject of a lawsuit under 42 U.S.C. §1983 for violation by a reporter, *Tim Dewar*, and a newspaper, *The Ojai Valley News,* of Ms. Brunette's rights. The case resulted in opinions by both the United States District Court for the Central District of California and the United States Circuit Court for the Ninth Circuit dismissing without discovery or trial Petitioner's claims on the grounds that there is no "state action" or violation of the Fourth Amendment when a news organization's reporter enters a private home pursuant to an oral agreement with law enforcement. The District Court dismissed the §1983 claims on October 20, 1997, and denied reconsideration on December 8, 1997. Final judgment dismissing the entire civil action was entered on August 31, 2000. The Circuit Court issued its first opinions on June 28, 2002. The Circuit Court amended its opinions on August 23, 2002 and denied Ms. Brunette's motion for reconsideration. The published opinion is found at 294 F.3d 1205.

JURISDICTION

Subject matter jurisdiction over the §1983 claim is found in 28 U.S.C. §§1331 and 1343. The Circuit Court had jurisdiction under 28 U.S.C. §1291.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Fourth Amendment, United States Constitution

Title 42, United States Code §1983

STATEMENT OF THE CASE

A. Nature of the Case

This case involves a newspaper and its reporter, *The Ojai Valley News* and *Dewar* ("the Media"), who, acting under color of law and under the imprimatur of a search warrant, entered Ms. Brunette's private property to record and publish photographs and accounts of the execution of the warrant. The Media were neither authorized by, nor assisting in the execution of, the warrant. This case involves a violation of clearly established rights under the Fourth Amendment to the United States Constitution, which provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The Media's invasive conduct gave rise to Ms. Brunette's Complaint for violations of the Fourth Amendment to the United States Constitution arising under 42 U.S.C. §1983, conspiracy to violate the Fourth Amendment, state common law claims for trespass, conversion and intentional and negligent infliction of emotional distress and for declaratory and injunctive relief.

B. Statement of Relevant Facts

On June 27, 1995, under a long-standing custom, policy and practice of the Humane Society of Ventura County, a law enforcement entity in California, the Media were invited to enter Ms. Brunette's private ranch to participate in the execution of a search warrant which the Media photographed and publicized for the benefit of the Humane Society. The Humane Society obtained and executed the search warrant which was limited to seizing only "sick, injured or dead" animals from Ms. Brunette's Ranch. The Magistrate Judge was not advised that the Media were invited to join the search; the warrant only authorized Humane Society officials to photograph and videotape items seized in the search, which they did. The Incident Reports and the Deputy Sheriff's Crime Report were silent about the Media's presence.

Respondent Dewar, the editor, reporter and photographer for Respondent *The Ojai Valley News*, accompanied the Humane Society onto Ms. Brunette's Ranch, camera in hand. Respondents were invited by the Humane Society to

join the search at the Ranch. The Media took photographs and searched the Ranch. The Media were not present for any law enforcement purpose and were not asked to assist in any investigation or emergency. They were made privy to confidential information about Ms. Brunette and the investigation. Ms. Brunette neither consented to, nor gave permission to, the Respondents to be on her property. Respondents published photographs, articles and an inflammatory editorial about the search, Ms. Brunette and her arrest (the Complaint cites publication dates spanning more than one year). Virtually all of Ms. Brunette's animals were seized; none was sick, injured or dead.

The search of Ms. Brunette's Ranch was just one of many photo opportunities taken by the Media during Humane Society law enforcement forays onto private property since at least 1992. Under an agreement to allow the Media to join searches, the Humane Society used their state powers to allow the Media (and other press organizations) onto private property to participate in and photograph or otherwise record searches, which were then publicized. The mutual benefits were significant: The Humane Society obtained publicity to promote their law enforcement efforts and to solicit donations for its animal shelter and the Media and other press organizations had a steady source of tantalizing animal photographs and stories to publish.

The joint activity between Respondents and the Humane Society is a custom, policy and practice that has occurred in Ventura County for years at a devastating cost to private citizens, including Ms. Brunette. The Humane Society caused Sheriff's deputies to arrest Ms. Brunette and she was criminally charged with animal neglect which was widely publicized by the Media. Ms. Brunette was

vindicated, however, on September 10, 1997, when the Appellate Department of the Superior Court for the County of Ventura granted her criminal appeal and caused the criminal complaint to be dismissed.

C. The District Court Decision

The District Court held that the Media were not State actors. Specifically the decision found that since the Media "is not alleged to have helped to obtain or execute the search warrant, it is not acting under color of state law" because it was "furthering its own news gathering interest." App. 50. The District Court did not cite or analyze this Court's decisions in *Wilson v. Layne* or *Hanlon v. Berger* either in the opinion's sections analyzing the constitutional claims against the Media, App. 49-53, or against law enforcement, App. 60-63.

D. The Ninth Circuit Decisions

The Ninth Circuit affirmed the District Court's erroneous rulings finding both that the Media is not a State actor and does not violate the Fourth Amendment when it enters private property pursuant to a warrant and explicit oral invitation of the State if it renders no assistance to law enforcement, and does not facilitate the State search. The Circuit found specifically that this Court's decisions in *Wilson v. Layne,* 526 U.S. 6031 (1999) and, by implication, *Hanlon v. Berger*, 526 U.S. 808 (1999), speak "exclusively to whether a police officer violates the Fourth Amendment by inviting the media to ride along during the execution of a search warrant. It provides no assistance in deciding whether the Media engaged in joint action sufficient to convert it into a state actor." App. 9. The Ninth Circuit

then found an explicit agreement, multiple violations of privacy and commercial exploitation to be outside the reach of the Fourth Amendment, §1983 and this Court's decisions in *Wilson v. Layne* and *Hanlon v. Berger.*

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT'S DECISION SANCTIONS UNLIMITED PRESS PARTICIPATION IN LAW ENFORCEMENT SEARCHES, EFFECTIVELY OVERRULING *WILSON v. LAYNE* AND *HANLON v. BERGER*

The Ninth Circuit's opinion is inconsistent with the decisions of the United States Supreme Court in finding that the Media did not engage in "state action" for purposes of 42 U.S.C. §1983. The Circuit erroneously held that "state action" requires financial integration between the media and law enforcement or that law enforcement have editorial or executive control over the media. The Circuit erroneously also held that "state action" requires that the media be engaged in the law enforcement activity. On the contrary, it is when the media engage in private news gathering under the imprimatur of law enforcement authority that their conduct is unlawful "state action".

The Circuit's opinion, in failing to accord legal significance to the oral agreement under which the Humane Society allowed the Media onto Ms. Brunette's ranch and inside her home – concluded under the long-standing custom, policy and practice of the Humane Society regularly inviting the Media onto private property to photograph and publish accounts of the execution of search warrants – failed to properly apply this Court's decisions

in *Wilson v. Layne* and *Hanlon v. Berger*. The press/police agreements in those cases, one oral and one written, were held by this Court to establish State action. The Circuit misapplies those precedents, purportedly establishing a test requiring more than an explicit agreement for State action.

Review by this Court is necessary to secure the Constitutional rights established by the decisions of this Court. That the Media were present on Petitioner's private property, by agreement with and facilitated by the Humane Society, under the imprimatur of a search warrant, to confer mutual benefits on each other, and for private, non-law enforcement purposes, is the precise type of conduct that the Constitution is designed to prohibit and §1983 is provided to redress.

The Ninth Circuit's instant decision erroneously holds that it is not a violation of the Fourth Amendment for law enforcement officers and the press to utilize a search warrant to enter private property and to permit invited press representatives to enter, search and photograph inside a private home. No greater derogation can be imagined of this Court's decisions in *Hanlon v. Berger* and *Wilson v. Layne*. The decision also conflicts with the Second Circuit Court of Appeal's decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *aff'g*, *Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994). Upholding this opinion will effectively revive the joint law enforcement and press conduct prohibited by the above-cited cases. The decision must be reviewed and revised both because of its enormous significance in the jurisprudence of the Fourth Amendment and because it will immediately authorize a resumption of the despicable unconstitutional invasions of

personal privacy by the press and the police apparently ended by *Hanlon v. Berger* and *Wilson v. Layne.*

CONCLUSION

THEREFORE, Petitioner GLENDA BRUNETTE requests that this Court GRANT this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENDA BRUNETTE,

Plaintiff-Appellant,

v.

HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation; THE OJAI PUBLISHING COMPANY, INC., d/b/a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR; JOLENE HOFFMAN; ROBERT JEFFREY HOFFMAN; SHAWNA BOATMAN; TIM COZATT,

Defendants-Appellees.

No. 00-56730

D.C. No.
CV-96-04557-DT

OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
February 6, 2002 – Pasadena, California

Filed June 28, 2002

Before: Stephen S. Trott, Sidney R. Thomas and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Trott

COUNSEL

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Nanci E. Nishimura (Briefed), Rossbacher & Associates, Los Angeles, California, for the plaintiff-appellant.

Kelli L. Sager (Argued and Briefed), Davis Wright Tremaine LLP, Los Angeles, California, for the defendants-appellees.

OPINION

TROTT, Circuit Judge:

Glenda Brunette ("Brunette") sued Tim Dewar ("Dewar") and the Ojai Valley News ("Ojai News") (collectively "the Media"), under 42 U.S.C. § 1983, for violating her Fourth Amendment rights during an illegal search of her property. The district court dismissed Brunette's claim because she did not allege facts sufficient to demonstrate that the Media was a state actor. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291, and we affirm the district court's decision. During the objectionable search of Brunette's ranch, the Media did not perform any government function or engage in any joint action with the Humane Society of Ventura County ("Humane Society"), which was executing the search warrant. The Media was not a state actor; it was simply a private spectator, photographing and videotaping the search independently and for its own purposes.[1]

BACKGROUND

Brunette, a 60-year old widow, operates a pedigreed cat breeding business on her eleven acre ranch and

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[1] In this opinion, we consider only Brunette's § 1983 claim against the Media for violation of her Fourth Amendment rights. In a separate, unpublished memorandum, we affirm, in part, reverse, in part, and remand, the district court's dismissal of Brunette's other claims.

avocado farm in the unincorporated portion of Ojai, California. Brunette's property is rugged and hilly, bordered by Los Padres National Forest. Fencing surrounds the entire property. Entrance is possible only by traversing a frontage road and passing through a locked gate. A "No Trespass" sign further dissuades unexpected visitors. A paved driveway snaking up a steep hill from the frontage road leads to Brunette's modest three-bedroom home.

In June 1995, concerned citizens reported to the Humane Society that Brunette was "selling cats that looked sick, with eyes matted shut and covered in flies and feces." The Humane Society was created by special California statute, and it engages in a quasi-public function. Cal. Corp. Code § 14502. Humane Society officers are invested with authority to investigate reports of animal cruelty, impound animals, place liens on property, and bring criminal charges against citizens. *Id.* The Humane Society and its officers are state actors for the purposes of § 1983.

Initially, the Humane Society visited Brunette's ranch and issued an administrative Notice of Correction, which directed Brunette to seek veterinary care for some of her cats. The Humane Society then sought and obtained a search warrant for Brunette's ranch, including "all rooms in the residence, and outbuildings and vehicles." The warrant authorized the Humane Society to seize "sick, injured or dead animals," medications, and all documents evidencing the treatment of animals, as well as to "photograph . . . the premises."

Just prior to executing the warrant, the Humane Society invited the Ojai News and local television station KADY (Channel 6) to accompany the search of Brunette's

ranch. The Ojai News circulates twice-weekly in a largely agrarian community for which stories about animals hold considerable interest. Not surprisingly, the Ojai News agreed to send reporter/photographer Dewar to cover the search. KADY, however, declined the Humane Society's invitation to attend.

Warrant in hand, the Humane Society proceeded to Brunette's ranch. Dewar was supposed to arrive at the ranch separately in his own vehicle. Accordingly, the Humane Society sought to delay commencement of the search until Dewar arrived at the ranch. Despite these efforts at delay, however, Dewar arrived after the Humane Society had severed Brunette's gate lock and begun the search. When Dewar finally arrived, officers stationed at Brunette's driveway invited him onto the property to observe the search and to take photographs for publication in the Ojai News. Dewar's only role during the search was to gather information as a reporter and a photographer. He rendered no assistance to the Humane Society and in no way facilitated its ability to search the premises. Ultimately, the Humane Society seized nearly forty cats, one Doberman Pinscher, and twelve feisty ducklings from Brunette's ranch. None of the animals seized was diseased, injured, or deceased.

Subsequently, Dewar wrote and the Ojai News published numerous articles and editorials decrying Brunette's mistreatment of animals and impugning her character. One article even suggested a "[m]andatory psychiatric evaluation" to "allow us an insight into [Brunette's] world which few of us can comprehend, appreciate, or sympathize." Most of the articles contained a photograph of a sickly animal, though some of the animals pictured were not owned by Brunette.

As a result of this search and investigation, the Ojai Sheriff charged Brunette with criminal animal neglect. Brunette moved to suppress all the fruits of the search of her ranch. The Superior Court for the County of Ventura, Appellate Department, ruled that at the time of the search, the Humane Society lacked statutory authority to execute search warrants and therefore, its search of Brunette's ranch violated the Fourth Amendment. The Court consequently granted Brunette's motion to suppress and dismissed the charges against her.

Seeking further vindication, Brunette filed this action against the Media and the Humane Society, alleging a violation of her Fourth Amendment rights as well as a panoply of state law causes of action, including a violation of her state constitutional rights, trespass, invasion of privacy, conspiracy, conversion, and infliction of emotional distress. Brunette settled her suit against the Humane Society. The Media filed a motion to dismiss Brunette's complaint for failure to state a claim. The district court granted this motion to dismiss.

Brunette appealed.

STANDARD OF REVIEW

We review de novo the district court's dismissal of a complaint for failure to state a claim. *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999). All factual allegations in the complaint must be accepted as true, and all reasonable inferences drawn in favor of Brunette. *See id.*

DISCUSSION

Brunette claims that the Media violated her constitutional right to be free of unreasonable searches and seizures under the Fourth Amendment.[2] *See Dennis v. Sparks,* 449 U.S. 24, 27-28 (1980) (recognizing suit for a private party's violation of another's Fourth Amendment rights). Although most rights secured by the Constitution are protected only against infringements by the government, *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 936 (1982), in certain circumstances, a litigant may seek damages under 42 U.S.C. § 1983 from a private party based on a violation of a constitutional right. Section 1983 liability extends to a private party where the private party engaged in state action under color of law and thereby deprived a plaintiff of some right, privilege, or immunity protected by the Constitution or the laws of the United States. *Haygood v. Younger,* 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

As the first step in establishing the Media's § 1983 liability, Brunette must sufficiently plead that the Media engaged in state action. Whether a private party engaged in state action is a highly factual question. *Howerton v. Gabica,* 708 F.2d 380, 383 (9th Cir. 1983) (citing *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 722 (1961)).

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[2] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Crucial is the nature and extent of the relationship between the Humane Society and the Media. *See Lugar,* 457 U.S. at 939. "Only by sifting facts and weighing circumstances" can we hope to ferret out obvious as well as non-obvious State involvement in private conduct. *Burton,* 365 U.S. at 722. Several tests have emerged to evaluate whether a private actor has engaged in state action.

Brunette asks us to consider three distinct tests, each of which, she claims, independently demonstrates that the Media engaged in state action during the search of her ranch. First, the "joint action" test examines whether private actors are willful participants in joint action with the government or its agents. *See Dennis,* 449 U.S. at 27-28. Second, and derivative of the joint action test, the "symbiotic relationship" test asks whether the government has so far insinuated itself into a position of interdependence with a private entity that the private entity must be recognized as a joint participant in the challenged activity. *See Rendell Baker v. Kohn,* 457 U.S. 830, 842-43 (1982). Last, the "public functions" test inquires whether the private actor performs functions traditionally and exclusively reserved to the States. *See Flagg Bros. v. Brooks,* 436 U.S. 149, 157 (1978).

A. Joint Action Test

Brunette most strenuously complains that the Media, in cahoots with the Humane Society, unconstitutionally searched her ranch and seized her property. Brunette contends that because the Media and the Humane Society acted jointly, the otherwise private Media became a state actor liable under § 1983.

"The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Wilson v. Layne,* 526 U.S. 603, 609-10 (1999) (quoting *Semayne's Case,* 77 Eng. 194 (K.B. 1604)). No one doubts Brunette's house is her castle; or that her ranch is her kingdom; or even that in appropriate circumstances one or the other might be obtained in exchange for a horse. William Shakespeare, Richard III, act 5, sc. 2. However, the sanctity of Brunette's home is not inviolable and its depths not impenetrable. For example, a police officer executing a valid search warrant may enter Brunette's home. Despite this privilege to enter, the police officer's actions while executing the warrant must relate to the objectives of the authorized intrusion. *See Arizona v. Hicks,* 480 U.S. 321, 325 (1987). If the "scope of the search exceeds that permitted by the terms of a validly issued warrant . . . [the search and any] subsequent seizure [are] unconstitutional." *Horton v. California,* 496 U.S. 128, 140 (1990).

In *Wilson,* for example, police officers obtained a valid warrant to enter the Wilson home and arrest Dominic Wilson. 526 U.S. at 606. Although media presence was not authorized by the warrant, the police officers invited a reporter and a photographer from the Washington Post to accompany them. *Id.* at 607. Upon reaching the Wilson home, the media entered under the imprimatur of the warrant; the photographer took numerous pictures and the print reporter observed a confrontation between the police and the Wilsons. *Id.* In this circumstance, the Supreme Court held that it was "a violation of the Fourth Amendment for police to bring members of the media . . . into a home during the execution of a warrant when the presence of the [media] in the home was not in aid of the

execution of the warrant." *Id.* at 614; *see also Buonocore v. Harris,* 65 F.3d 347, 356 (4th Cir. 1995); *Ayeni v. Mottola,* 35 F.3d 680, 686 (2d Cir. 1994).

Brunette argues that *Wilson* conclusively demonstrates that the Media incurred § 1983 liability because it participated in an illegal search of her ranch. We disagree. *Wilson* speaks exclusively to whether a *police officer* violates the Fourth Amendment by inviting the media to ride-along during the execution of a search warrant. It provides no assistance in deciding whether the Media engaged in joint action sufficient to convert it into a state actor. To answer this question, we look to governing § 1983 case law outlining the joint action test.

To be engaged in joint action, a private party must be a "willful participant" with the State or its agents in an activity which deprives others of constitutional rights. *Dennis,* 449 U.S. at 27. A private party is liable under this theory, however, only if its particular actions are "inextricably intertwined" with those of the government. *Mathis v. Pac. Gas & Elec. Co.,* 75 F.3d 498, 503 (9th Cir. 1996); *Collins v. Womancare,* 878 F.2d 1145, 1154 (9th Cir. 1989) (necessitating a showing of "substantial cooperation" between the private party and the State). A conspiracy between the State and a private party to violate another's constitutional rights may also satisfy the joint action test. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150-52 (1970); *Howerton,* 708 F.2d at 383; *United Steelworkers v. Phelps Dodge Corp.,* 865 F.2d 1539, 1546-47 (9th Cir. 1989) (en banc).

We previously accepted the theoretical possibility of joint action between law enforcement and the media in *Berger v. Hanlon,* 129 F.3d 505, 514-16 (9th Cir. 1997),

vacated and remanded by 526 U.S. 808 (1999), *judgment reinstated by* 188 F.3d 1155 (9th Cir. 1999). In *Berger,* the United States Fish & Wildlife Service ("USFWS") investigated the Bergers for illegally killing protected birds of prey. 129 F.3d at 508. Upon hearing of the investigation, the Cable News Network ("CNN") approached the USFWS to vet the possibility of a television deal. *Id.* CNN wanted footage for their environmental programs, and as it turned out, the USFWS was looking for an outlet to publicize its efforts combating environmental crime. *Id.* CNN and the Assistant United States Attorney executed a letter agreement allowing CNN to accompany the USFWS Agents "as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." *Id.*

On March 18, 1993, a magistrate judge issued a search warrant for the Bergers' ranch and appurtenant structures, excluding the residence; the warrant was silent as to CNN's participation in the search. *Id.* The day before the search, CNN participated in a pre-search briefing which included the dissemination of sealed, confidential information about the Bergers. *Id.* at 509. On the morning of the search, the USFWS and CNN gathered on a country road near the Bergers' ranch to discuss again the search. *Id.* CNN then proceeded with the USFWS in a caravan of ten vehicles to a point near the Bergers' ranch. *Id.*

CNN mounted video cameras both inside and outside the USFWS vehicles, and at least one USFWS Agent wore a hidden microphone, which continuously transmitted live audio to the CNN technical crew. By the end of the search, CNN had recorded more than eight hours of videotape.

We found that "[t]his was no ordinary search." *Id.* at 509. "It was jointly planned by law enforcement officials and [CNN], as memorialized by a written contract, so that the officials could assist [CNN in] obtaining material for their commercial programming." *Id.* "This search [stood] out as one that at all times was intended to serve a major purpose other than law enforcement." *Id.* Nothing was passive about USFWS's involvement with CNN. *Id.* at 512. "They acted together." *Id.* at 516. Considering the "inextricable involvement of [CNN] with both the planning and execution of th[e] search," the USFWS's active involvement with CNN's news gathering activities, and the mutual benefits derived by CNN and the USFWS, we found "more than enough" to conclude that CNN's actions were those of a state actor. *Id.* at 515 (citations omitted).

In this case, Brunette seeks to analogize her case to the facts in *Berger.* She hinges her claim on two factual allegations: (1) pursuant to a long-standing custom to invite the Media to observe and photograph the execution of search warrants, the Humane Society notified the Media of an imminent raid on Brunette's ranch; and (2) when Dewar arrived at the ranch, the Humane Society invited him to enter the premises and observe and photograph the search.

Ultimately, however, Brunette's contentions fail. Brunette's allegations do not establish any substantial cooperation or inextricably intertwined activity between the Media and the Humane Society. Brunette alleged that an amorphous longstanding custom facilitated the Media's presence at Brunette's ranch. While we accept that allegation as true, unlike the letter agreement in *Berger,* the Media did not contract with the Humane Society to accompany it on this raid specifically. The generalized

allegation of a wink and a nod understanding between the Media and the Humane Society does not amount to an agreement or a conspiracy to violate Brunette's rights in particular. Indeed, the Media did not participate in any discussions about Brunette prior to the issuance of the warrant, and in fact, it had no knowledge of Brunette or the animal cruelty complaints against her until the imminent execution of the search warrant.

Unlike CNN in *Berger,* the Media neither planned the raid nor participated in any preraid briefings. Nor did the Humane Society in this case disclose to the Media any confidential information like the USFWS disclosed to CNN in *Berger.* Moreover, Dewar arrived at Brunette's ranch independently in his own vehicle, *after* the Humane Society had cut the gate lock and begun to search.

Upon Dewar's arrival at the ranch, the Humane Society invited him to enter the premises and observe and photograph the execution of the warrant. But unlike the USFWS in *Berger,* the Humane Society did nothing to facilitate the Media's news gathering mission. Humane Society officers were not outfitted with video cameras or surreptitiously miked for sound.

Although simultaneously present at Brunette's ranch, the Humane Society and the Media acted independently. The Media retained control over what footage to photograph and which events to memorialize. Neither the Media nor the Humane Society assisted the other in performance of its separate and respective task. Dewar's news gathering mission was entirely distinct from the

Humane Society's investigation of animal cruelty charges. Indeed, as part of the Humane Society's investigation it photographed and filmed the search independently.[3] Lacking was the requisite substantial cooperation between the Media and the Humane Society.

As opposed to the search in *Berger,* this was an ordinary search to which the Humane Society invited the Media at the last minute.[4] During the search, the Media's actions were its own; they were not "state actions" directed by or jointly conceived, facilitated or performed by the

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[3] While we note that the Humane Society's warrant authorized photography of Brunette's ranch, our reasoning does not rely upon the reasoning found in *Stack v. Killian,* 96 F.3d 159 (6th Cir. 1996). In that case, a television crew participated in and filmed the execution of a search warrant. *Id.* at 163. The Sixth Circuit condoned this activity because the warrant authorized "videotaping and photographing" even though it "said nothing about a television crew." *Id.*

[4] In some material respects our case closely parallels *Parker v. Boyer,* 93 F.3d 445 (8th Cir. 1996). In that case, KSDK television contacted the St. Louis Police Department and told them it was interested in developing a story about police efforts to eradicate illegal weapons. *Id.* at 446. Sometime later, the police told KSDK about a weapons investigation in progress. *Id.* KSDK accompanied the police on an evening search of a private residence. *Id.* at 446-47. The entourage entered the house through an unlocked door; KSDK filmed while the police searched the residence. The Eighth Circuit held:

> It is undisputed that KSDK acted independently of the police in deciding to enter the house and videotape the events there and that neither KSDK nor the police assisted the other in the performance of their separate and respective tasks. The KSDK personnel did not execute the search warrant and they entered the house after the police did. The television station was there for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house.

Id. at 448.

Humane Society. Because the Media was not a state actor during the search, it cannot be held liable under § 1983.

B. Symbiotic Relationship Test

Where a private party and the government exist via what amounts under the law to a "symbiotic relationship" (like oxpeckers and rhinoceros), we have held the private party responsible as a state actor under § 1983. In a symbiotic relationship the government has "so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity." *Burton,* 365 U.S. at 725. In *Burton,* for example, the Supreme Court found state action on the part of a privately-owned restaurant which refused to serve African-American customers. *Id.* at 716. The restaurant was located in a public parking garage, benefitted from the Parking Authority's tax exemption and maintenance of the premises, and in turn, provided the Parking Authority with the income it needed to maintain fiscal viability. *Id.* at 719-20. Although the Parking Authority had no part in the restaurant's discriminatory policies, the Court found that its relationship was one of interdependence; the Parking Authority had placed its power, property, and prestige behind the restaurant's discrimination, and thereby had become a joint participant in that discrimination. *Id.* at 725.

Burton teaches that substantial coordination and integration between the private entity and the government are the essence of a symbiotic relationship. Often significant financial integration indicates a symbiotic relationship. *See Rendell Baker,* 457 U.S. at 842-43; *Vincent v. Trend W. Tech. Corp.,* 828 F.2d 563, 569 (9th Cir. 1987).

For example, if a private entity, like the restaurant in *Burton,* confers significant financial benefits indispensable to the government's "financial success," then a symbiotic relationship may exist. *Vincent,* 828 F.2d at 569. A symbiotic relationship may also arise by virtue of the government's exercise of plenary control over the private party's actions. *See Dobyns v. E-Systems, Inc.,* 667 F.2d 1219, 1226-27 (5th Cir. 1982) (finding symbiotic relationship where the government controlled a private peacekeeping force engaged in a government-directed field mission in the Sinai Peninsula).

Here, Brunette asserted no relationship remotely sufficient to establish a symbiotic relationship between the Humane Society and the Media. She did not allege that the Humane Society and the Media were financially integrated. Nor did she allege the Media rendered any service indispensable to the Humane Society's continued financial viability. With or without the Media, the Humane Society, funded by the State, would continue to execute its mission protecting animals from abuse and cruelty. Certainly, Brunette did not claim the Humane Society ever exercised any editorial or executive control over the Media, its gathering of news, or its publication decisions.

What Brunette did allege was a long-standing custom by the Humane Society to allow the Media to observe and photograph the execution of search warrants. This custom, Brunette asserted, ensured that the Humane Society received free publicity and the Media received "a steady source of sensational stories." These allegations, even if true, do not demonstrate that the Humane Society or the Media is indispensable, in any way, to the other's continued business operation or financial success. Ultimately, any exchange of "mutual benefits" between the Humane

Society and the Media falls far short of creating the substantial interdependence legally required to create a symbiotic relationship.

C. Public Function Test

Finally, we are not persuaded by Brunette's contention that the Media became a state actor under the public functions test. Private activity becomes a "public function" only if that action has been "traditionally the exclusive prerogative of the State." *Rendell Baker,* 457 U.S. at 842 (quoting *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 353 (1974)); *see also Vincent,* 828 F.2d at 569 (finding repair of fighter jets a traditional function of the government, but not one of its exclusive prerogatives). If private actors hold elections, *Terry,* 345 U.S. at 484, govern a town, *Marsh v. Alabama,* 326 U.S. 501, 507-09 (1946), or serve as an international peacekeeping force, *Dobyns,* 667 F.2d at 1226-27, they have been held responsible as state actors. On the other hand, if private actors educate "maladjusted" youth, *Rendell-Baker,* 457 U.S. at 842, or resolve credit disputes, they have not been held to perform an exclusive prerogative of the State, and thus, they have not been held responsible as state actors. *Flagg Bros.,* 436 U.S. at 157-60.

Brunette argues that the Media entered her ranch under the imprimatur of the Humane Society's warrant and proceeded to search as though "part of the search brigade." In her complaint, however, Brunette conceded that the Media did not engage in any law enforcement activity during the search of her ranch, and indeed, the record reflects that the Media limited its activities during the search to photographing and videotaping. While law

enforcement and the execution of search warrants may be the exclusive prerogative of the State, gathering news is not so regarded. Newsgathering is the quintessential private activity, jealously guarded from impermissible government influence.

Because the Media engaged in no public function during the search of Brunette's ranch, it was not liable as a state actor under § 1983.

CONCLUSION

During the objectionable search of Brunette's ranch the Media acted as a private spectator rather than a state actor; thus, it incurred no § 1983 liability.

AFFIRMED.

INTERNAL USE ONLY: Proceedings include all events.
00-56730 Brunette v. Humane Society of, et al

GLENDA BRUNETTE Plaintiff-Appellant	Henry H. Rossbacher, Esq. FAX 213/895-6161 213/895-6500 Suite 1650 [COR LD NTC ret] Nanci E. Nishimura, Esq. FAX 895-6161 (213) 895-6500 Suite 1650 [COR LD NTC ret] ROSSBACHER & ASSOCIATES 811 Wilshire Blvd. Los Angeles, CA 90017-2666
v.	
HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation Defendant-Appellee	Mark A. Weinstein, Esq. [COR LD NTC ret] VEATCH, CARLOS, GROGAN & NELSON 3926 Wilshire Blvd. Suite 200 Los Angeles, CA 90010
THE OJAI PUBLISHING COMPANY, INC., d/b/a THE OJAI VALLEY NEWS, a corporation Defendant-Appellee	Mark A. Weinstein, Esq. (See above) [COR LD NTC ret] Kelli L. Sager, Esq. (213) 633-6800 Suite 2400 [COR LD NTC ret] DAVIS WRIGHT TREMAINE 865 South Figueroa Street Los Angeles, CA 90017

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TIM COZATT Defendant-Appellee	Mark A. Weinstein, Esq. (See above) [COR LD NTC ret] Kelli L. Sager, Esq. (See above) [COR LD NTC ret]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLENDA BRUNETTE,

Plaintiff-Appellant,

v.

HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation; THE OJAI PUBLISHING COMPANY, INC., d/b/a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR; JOLENE HOFFMAN; ROBERT JEFFREY HOFFMAN; SHAWNA BOATMAN; TIM COZATT,

Defendants-Appellees.

No. 00-56730

D.C. No. CV-96-04557-DT

MEMORANDUM*

(Filed Jun. 28, 2002)

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted February 6, 2002
Pasadena, California

Before: TROTT, THOMAS and WARDLAW, Circuit Judges

Glenda Brunette ("Brunette") appeals the district court's dismissal of her complaint against Tim Dewar and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

the Ojai Valley News ("collectively "the Media"). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's dismissal of a complaint for failure to state a claim. *TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999). All factual allegations in the complaint must be accepted as true, and all reasonable inferences drawn in favor of Brunette. *Id.*

We hold that Brunette has alleged facts sufficient to state claims for trespass and invasion of privacy, and we reverse and remand those causes of action. We affirm the district court's dismissal of Brunette's other causes of action.[1]

DISCUSSION

I Trespass

Under California law, the Media is subject to trespass liability, irrespective of whether it caused harm, if it intentionally entered land in possession of another. *Miller v. Nat'l Broad. Co.,* 232 Cal. Rptr. 668, 677 (Cal. Ct. App. 1986). The First Amendment is not a license to trespass. *See Shulman v. Group W Prods. Inc.,* 955 P.2d 469, 496 (Cal. 1998). However, a peaceable entry onto land with the consent of a person in lawful possession or control of the

[1] In a separate, published opinion filed simultaneously with this memorandum, we recount the facts of Brunette's case in some detail. There, we affirm the district court's dismissal of Brunette's § 1983 claim against the Media for violation of her Fourth Amendment rights because she did not allege facts sufficient to demonstrate the Media was a state actor.

property is not actionable. *See* 5 Witkin, Summary of California Law § 607 (9th ed.1988).

The Media claims the invitation and consent of the Humane Society absolved its entry onto Brunette's ranch of the taint of trespass. However, the Humane Society entered Brunette's ranch pursuant to an invalid search warrant and thus, never gained lawful control of the premises. It appears the Humane Society had no authority to enter the property itself, much less grant lawful entry to the Media.

Brunette alleged that the Media's presence was neither authorized by the warrant nor necessary to the Humane Society's investigation. Even if the Humane Society's presence was permissible, the Media performed no law enforcement related activity during the search. In fact, Brunette alleged that the Media's presence was superfluous, as the Humane Society photographed and videotaped the scene independently. If proven, Brunette's allegations may demonstrate that the Media's entry onto her ranch constituted a trespass. Consequently, we reverse and remand the district court's dismissal of this cause of action.

II Invasion of Privacy

Brunette alleged a sufficient privacy interest in her home and property as well as a reasonable expectation of privacy in those items. Nevertheless, the district court determined that the Media committed no serious or offensive invasion of privacy because it entered Brunette's ranch legally, upon receiving consent from the Humane Society. As discussed above, Brunette alleged that the Media, in fact, entered her ranch illegally. Any illegal

entry would be sufficiently serious and offensive to state a claim for invasion of privacy. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 247-49 (9th Cir. 1971) (applying California law) (finding invasion of privacy where reporter entered and photographed the plaintiff at home without authorization). Thus, we reverse and remand the district court's dismissal of this cause of action.

III Conspiracy

Finding no underlying trespass or invasion of privacy, the district court dismissed Brunette's conspiracy claim. In the alternative, the district court dismissed this claim because Brunette failed to allege with particularity any behavior in furtherance of a conspiracy. We agree with the district court's alternative rationale. Brunette did not sufficiently allege any particular actions by the Humane Society or the Media in furtherance of a conspiracy to violate her rights. Instead the record reflects that the Humane Society unilaterally invited the Media to accompany its search of Brunette's ranch, and that the Humane Society and the Media never discussed how the search would be performed. There was no agreement to violate Brunette's rights; thus her conspiracy cause of action fails.

IV Conversion

The district court dismissed Brunette's claim that the Media converted images of her property through photography. Although a claim of conversion may exist even if the allegedly converted property is intangible, *see A & M Records, Inc. v. Heilman,* 142 Cal. Rptr. 390, 400 (Cal. Ct. App. 1977), not all intangible property is the proper subject of conversion. Courts have traditionally refused to

recognize conversion of intangible assets that are not merged with something tangible. *See Thrifty-Tel, Inc. v. Bezenek,* 54 Cal. Rptr. 2d 468, 472 (Cal. Ct. App. 1996).

A photographic image is not generally an intangible property right protected by a conversion claim, *see Ault v. Hustler Magazine, Inc.,* 860 F.2d 877, 883 (9th Cir. 1988), and Brunette points to no California case in which a photographic image was the subject of a conversion. The district court properly dismissed this claim.

V Infliction of Emotional Distress

Brunette alleged that she suffered emotional distress due to the Media's trespass on her ranch. As a part of Brunette's trespass action, she may recover damages for "discomfort and annoyance that would naturally ensue therefrom." *Kornoff v. Kingsburg Cotton Oil Co.,* 288 P.2d 507, 511 (Cal. 1955) (internal citations and quotations omitted). She may not, however, seek duplicative recovery under the guise of an action for emotional distress. *Billmeyer v. Plaza Bank of Commerce,* 50 Cal. Rptr. 2d 119, 126 (Cal. Ct. App. 1995) (finding no authority that a trespass gives rise to an action for emotional distress). Brunette also alleged infliction of emotional distress stemming from the Media's publication of the photographs taken during the search. Although emotional distress may be considered as damage in a properly stated defamation action, it cannot form the basis of an independent infliction of emotion [sic] distress action on the same facts. *See Grimes v. Carter,* 50 Cal.Rptr. 808, 813 (Cal. Ct. App. 1966). Therefore, the district court properly dismissed these claims.

VI Declaratory Relief

The district court denied Brunette's request for declaratory relief. Declaratory relief is appropriate when (1) the judgment will serve a useful purpose in clarifying and settling legal relations; and (2) when it will terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding. *Bilbrey v. Brown,* 738 F.2d 1462, 1470 (9th Cir. 1984). The district court's decision to deny declaratory relief is reviewed for an abuse of discretion. *Wilton v. Seven Falls Co.,* 515 U.S. 277, 289 (1995). In this case, declaratory relief served no purpose beyond the remedies Brunette sought on her claims at law. Therefore, the district court properly denied Brunette's request for declaratory relief.

VII Injunction

Finally, Brunette sought an injunction restraining the Media from further publication of the images taken during the objectionable search. In essence, Brunette asked us to impose a prior restraint – a heavily disfavored remedy. *See CBS, Inc. v. Davis,* 510 U.S. 1315, 1317 (1994). Because post-publication remedies will adequately compensate Brunette for any injury, *see id.,* the district court properly denied Brunette's request for injunctive relief.

VIII Statute of Limitation

The district court found that Brunette alleged facts in her complaint which sufficed to toll the statute of limitations for one day. Cal. Civ. Proc. Code § 357. The Media takes no appeal from this decision.

CONCLUSION

We reverse and remand Brunette's claims for trespass and invasion of privacy. The district court properly decided all other issues.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

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00-56730 Brunette v. Humane Society of, et al

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLENDA BRUNETTE, Plaintiff-Appellant, v. HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation; THE OJAI PUBLISHING COMPANY, INC., d/b/a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR; JOLENE HOFFMAN; ROBERT JEFFREY HOFFMAN; SHAWNA BOATMAN; TIM COZATT, Defendants-Appellees.	No. 00-56730 D.C. No. CV-96-04557-DT Central District of California, Los Angeles ORDER AMENDING MEMORANDUM DISPOSITION (Filed Aug. 23, 2002)

Before: TROTT, THOMAS and WARDLAW, Circuit Judges

The Memorandum Disposition filed June 28, 2002, is amended as follows:

The Memorandum Disposition at page 7, Section VIII Statute of Limitations:

[*REPLACE SECTION VIII STATUTE OF LIMITATIONS WITH THE FOLLOWING*]

VIII Statute of Limitation

The Media alleges a statute of limitation defense to Brunette's tort claims. The Media asserts that the district court erred when it

> concluded that because Brunette "was arrested *contemporaneously* with the alleged entry" onto her ranch, the controlling one-year statute of limitation was "tolled until her release from jail." Cal. Civ. Proc. Code § 357. Upon review of the record and the controlling cases, we agree with the district court's conclusion that Brunette's tort claims are not time-barred. *See Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994).

Appellee's petition for rehearing filed July 12, 2002, is hereby DENIED.

So ORDERED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLENDA BRUNETTE,

Plaintiff-Appellant,

v.

HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation; THE OJAI PUBLISHING COMPANY, INC., d/b/a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR; JOLENE HOFFMAN; ROBERT JEFFREY HOFFMAN; SHAWNA BOATMAN; TIM COZATT,

Defendants-Appellees

No. 00-56730

D.C. No. CV-96-04557-DT Central District of California, Los Angeles

ORDER

(Filed Aug. 23, 2002)

Before: TROTT, THOMAS and WARDLAW, Circuit Judges

The panel as constituted above has voted to deny appellant's petition for rehearing, and to deny the petition for rehearing en banc filed July 19, 2002.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc, are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-56730
CT/AG#: CV-96-04557-DT

GLENDA BRUNETTE

Plaintiff-Appellant

v.

HUMANE SOCIETY OF VENTURA COUNTY, a non-profit corporation; THE OJAI PUBLISHING COMPANY, INC., d.b.a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR; JOLENE HOFFMAN; ROBERT JEFFREY HOFFMAN; SHAWNA BOATMAN; TIM COZATT

Defendants-Appellees

(Filed Aug. 23, 2002)

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Filed and entered	June 23, 2002
Amended	August 23, 2002

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GLENDA BRUNETTE, Plaintiff, vs. THE HUMANE SOCIETY OF VENTURA COUNTY; THE OJAI VALLEY NEWS; JOLENE HOFFMAN; JEFFREY HOFFMAN; SHAWNA BOATMAN; TIM COZAT; AND TIM DEWAR, Defendants.	) CASE NO.) CV 96-4557 DT (JGx))) **ORDER GRANTING MEDIA DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT; ORDER GRANTING IN PART AND DENYING IN PART HUMANE SOCIETY DEFENDANTS' MOTION TO DISMISS.**)) (Filed Oct. 20, 1997)

Background

This action concerns the alleged illegal search of Plaintiff Glenda Brunette's ("Brunette") home, and the seizure of animals, by officers of Defendant Humane Society Of Ventura County ("Humane Society"), Defendant Humane Society Director Jolene Hoffman, Senior Officer Robert Hoffman, Field Supervisor Shawna Boatman, and Humane Officer Tim Cozat (collectively the "Humane Society Defendants"); accompanied by an employee of Defendant Ojai Valley News ("OVN"), Defendant photographer Tim Dewar (Dewar") (collectively the "media Defendants" or "OVN Defendants"). Plaintiff Brunette seeks damages for Section 1983 violations, Invasion of Privacy, Conspiracy regarding the Section 1983 violations

and Invasion of Privacy causes of action, Trespass, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Conversion. Plaintiff Brunette also seeks a Declaratory Judgment of improper activity and Injunctive relief.

1. Factual Summary As Alleged In Plaintiff's Second Amended Complaint.

On or about June 2, 1995, Sheila A. Osborne ("Osborne") of Ojai and Cheryl Miller ("Miller") of Thousand Oaks went to the Brunette Ranch in Ojai, an avocado ranch owned and primarily operated by the plaintiff. *See* Second Amended Complaint ("SAC"), ¶ 30. On or about June 9, 1995, Osborne and Miller filed a complaint (presumably with the Humane Society) against Brunette alleging that cats on Brunette's property looked sick. *See* SAC, ¶ 30.

In response, on or about June 23, 1995, the field supervisor Shawna Boatman ("Boatman") and preliminary investigator Tim Cozat ("Cozat") of the Humane Society of Ventura County (apparently acting as a quasi-public agency) met with District Attorney investigator Mark Volpei ("Volpei") at Brunette's ranch. *See* SAC, ¶ 30. Under the pretext of purchasing a cat for his daughter, Volpei made an appointment with Brunette and entered the property at 1:10 p.m. *See* SAC, ¶ 29-30. Boatman and Cozat arrived ten minutes later, uninvited, and told Brunette of the complaint filed against her. *See* SAC, ¶ 30.

Volpei, claiming authority as a law enforcement officer, falsely told Cozat that Cozat had a right to enter the garage. *See* SAC, ¶ 31. Cozat attempted to enter the garage, but Brunette blocked him with her body and

refused to allow him to proceed. *See Id.* Boatman then issued a notice of correction ("Notice") allegedly directing Brunette to make a veterinarian appointment for certain cats. *See Id.* Cozat told Brunette that the Humane Society would return in 72 hours to check that the cats had been seen by a veterinarian or that she had an appointment. *See Id.*

On June 27, 1995, Magistrate Judge Hintz of Ventura County issued a search warrant for the search of the Brunette Ranch ("Search Warrant" or "Warrant"). *See* SAC, ¶ 34. The Search Warrant authorized Boatman to search the entire Ranch, but only to seize "sick, injured, or dead animals," medications and all documents evidencing treatment of the animals. *See Id.* The Search Warrant also authorized Boatman to take photos of the premises and any items seized. *See Id.*

Issuance of the Search Warrant was based on the following false representations made in Boatman's Declaration In Support Of Probable Cause For A Search Warrant ("Boatman Declaration") on June 27, 1995. *See* SAC, ¶ 35.

First, the Boatman Declaration stated that the reporting party (Osborne and/or Miller) indicated that Brunette was selling cats that looked sick, with eyes matted shut and covered in flies and feces, and that cats showed signs of upper-respiratory disease. *See* SAC, ¶ 35. When Osborne and Miller went to the Ranch, Brunette told them that the kittens were so young that their eyes had not opened yet and were too young to be released. *See Id.*

Second, the Boatman Declaration claimed that Brunette had not made a veterinarian appointment as the Notice required. *See* SAC, ¶ 33. On or about June 26, 1995,

Brunette made an appointment with the Matilija Animal Hospital for June 27, 1995 and so advised the Humane Society. *See Id.*

Third, the Boatman Declaration did not indicate that the press or local KADY television station would be invited, or that the Ojai Valley News and Tim Dewar would participate in executing the Search Warrant. *See* SAC, ¶ 37.

Upon information and belief, the Humane Society, Jolene Hoffman, Jeff Hoffman, Boatman and Cozat (collectively "Humane Society Defendants") have a long-standing policy, custom and practice of asking newspapers and television stations ("Media") to participate in photographing and recording the execution of search warrants on private property. *See* SAC, ¶ 38.

Upon information and belief, the Humane Society Defendants invite the Media to participate in these search warrants in order to gain publicity for the Humane Society's activities and to solicit donations. *See* SAC, ¶ 36. In return, the Media receives steady access to these "news" events. *See Id.* The Humane Society Defendants received significant publicity for their search executed with the assistance of the OVN Defendants. *See* SAC, ¶ 46.

The Search Warrant was executed by Boatman, Jolene Hoffman, Jeff Hoffman and Cozat (the "individual Humane Society Defendants"); and joined by Volpei, Senior Deputy Sheriff Janice Clancy, Sheriff Deputy Landis Potter, Senior Code Enforcement Officer Liz Cameron, Code Enforcement Officer Clyde Henderson; as well as the Ojai Valley News and Dewar ("media Defendants"). *See* SAC, ¶ 37.

No one was at the Ranch when the Search Warrant party arrived on June 27, 1995. *See* SAC, ¶ 38. Cozat cut the chain to the pipe gate, the party entered the property, and the party went into the house to search for evidence of animal abuse. *See Id.*

The OVN Defendants took photos and searched the ranch. *See* SAC, ¶ 39.

As the search was continuing, Sheriff's Deputies Clancy and Potter were advised that Plaintiff was approaching the ranch. Sac, ¶ 43. The Deputies accosted Plaintiff in the parking lot of a local market and proceeded to arrest her and advise her of the grounds for the arrest. Id. On that day, Plaintiff was imprisoned on two felony criminal charges for allegedly violating Penal Code sections 597(b) and 597(f), and one misdemeanor charge. On June 28, 1995, Plaintiff was released from imprisonment. SAC, ¶ 45.

Thereafter (on unspecified dates) OVN published these photos, and wrote articles about Brunette and the search and seizure of her animals. *See* SAC, ¶ 42. The article stated that Brunette was an animal abuser to be charged with several felonies, when no felony charges have ever been filed. *See id.* It also erroneously stated that Brunette tried to flee from the scene when her property was being searched. An editorial clearly identifying Brunette characterized her in an "embarrassing, humiliating and inflammatory manner." SAC, ¶ 50.

The Humane Society incident reports did not indicate that the OVN Defendants: (1) were present at the search, (2) photographed or searched the Ranch, or (3) published photos and information obtained by their presence at the search. *See* SAC, ¶ 53.

The Search Warrant only authorized the search of the Brunette Ranch and did not authorize inviting the OVN Defendants. *See* SAC, ¶ 54. The OVN Defendants were not present under any license or privilege or for any law enforcement purposes. *See* SAC, ¶ 55. Brunette was not asked for permission and did not consent to allowing the OVN Defendants onto her property. *See* SAC, ¶ 56. If she knew the OVN Defendants were present during the search, she would have told them to leave. *See id.*

Approximately three dozen pedigree cats and kittens, twelve ducklings, and one Doberman dog were seized from Ms. Brunette's property on June 27, 1995. *See* SAC, ¶ 47. In June 1996, the ducklings and dog only were returned. *See Id.*

There was no evidence of animal abuse among the seized animals. *See* SAC, ¶ 49. Upon examination on June 28, 1995, veterinarian Dr. Shouse found that seven of the cats, an unspecified number of kittens, and the Doberman did not have evidence of any severe problem. *See Id.*

Many of the animals seized were not "sick, injured, or dead" as required by the Search Warrant. SAC, ¶ 49, 61.

As a result of the Defendants' acts, Brunette has suffered "extreme emotional and physical distress, humiliation, embarrassment and other injuries" as well as suffering monetary loss. SAC, ¶ 61.

Plaintiff prays for general, special and future damages, including emotional distress, according to proof, exemplary damages in excess of $5 Million, attorneys' fees, declaratory relief as specified in the eleventh cause of action (that Defendants' past acts were actionable) and

injunction against the media Defendants from future use of the photographs or information.

2. Procedural History

On June 28, 1996, Brunette filed her initial Complaint in this Court seeking damages for alleged violation of the United States Constitution (4th & 5th Amendments); Conspiracy; Trespass; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; False Arrest; and for Declaratory Judgment and Injunction. *See* Complaint.

On February 24, 1997, the Humane Society Defendants filed a Motion To Dismiss the Complaint pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6). *See* Notice Of Motion And Motion To Dismiss Pursuant To Federal Rules Of Civil Procedure, Rule 12(b)(6).

On April 17, 1997, the parties stipulated to the filing of the First Amended Complaint and the Motion To Dismiss the original Complaint was taken off the calendar. *See* Stipulation For Filing And Service Of First Amended Complaint And To Continue Hearing.

Plaintiff Brunette filed the First Amended Complaint on May 7, 1997, seeking damages for alleged violation of the U.S. Constitution (Fourth Amendment), Invasion of Privacy (Cal. Const. Art. I, §1), Conspiracy, Trespass, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, for Declaratory Judgment and Injunction. *See* First Amended Complaint.

On May 30, 1997, the Humane Society Defendants filed a Motion To Dismiss The First Amended Complaint For Failure To State A Claim Upon Which Relief Can Be

Granted. *See* May 30, 1997 Motion To Dismiss. The Humane Society Defendants sought dismissal of the First (Section 1983), Second (Violation of Right to Privacy), Third (Conspiracy), and Ninth (Declaratory Judgment) causes of action of the First Amended Complaint – all causes of action alleged against them *except* for the Fifth Cause of Action for Trespass, to which no challenge is made. *See Id.* This Court's Order of July 15, 1997 granted the dismissal without prejudice and with leave to amend on the grounds the claims were time-barred.

On June 6, 1997, the media Defendants also filed a Motion To Dismiss The First Amended Complaint For Failure To State A Claim Upon Which Relief Can Be Granted. *See* June 6, 1997 Motion To Dismiss. The OVN Defendants sought dismissal of the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action – all causes of action alleged against them. *See Id.* This Court's Order of July 15, 1997 dismissed the First, Second, Third, Sixth and Seventh causes of action on the grounds the claims were time-barred. The remaining causes of action were dismissed pursuant to FRCP 12(b)(6).

On August 13, 1997, Plaintiff filed her Second Amended Complaint ("SAC") alleging the same substantive causes of action with the addition of a claim for Judicial Deception under the U.S. Constitution.

On September 2, 1997, the Humane Society Defendants filed a Motion to Dismiss pursuant to FRCP 12(b)(6), which is before this Court today.

On September 5, 1997, the media Defendants filed a Motion to Dismiss pursuant to FRCP 12(b)(6), which is before this Court today.

Discussion

1. Standard

Rule12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Pursuant to Rule 12(b)(6), this Court may only dismiss a plaintiff's complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether a plaintiff is entitled to offer evidence in support of his claim. *Cabo Distributing Co., Inc. v. Brady*, 821 F.Supp. 601 (N.D. Cal. 1992). In testing the sufficiency of a complaint, the court must assume that the plaintiff's allegations are true, and must construe the compliant [sic] in a light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981) (citing *California Dump Truck Owners Assn. v. Associated General Contractors of America*, 562 F.2d 607, 614 (9th Cir. 1997); *McKinney v. DeBord*, 507 F.2d 501, 503 (9th Cir. 1974)). Since a complaint need only consist of a concise statement of facts upon which relief can be granted upon any legally sustainable basis, only a generalized statement of facts from which the defendant may form a responsive pleading is necessary. *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957). Therefore, it is only the extraordinary case in which dismissal is proper. *Corsican Productions v. Pitchess*, 338 F.2d 441, 442 (9th Cir. 1964).

A motion to dismiss for failure to state a claim challenges the pleadings. The Court may not consider outside evidence presented in connection with the motion without converting to a motion for summary judgement and giving adequate notice of such intent. *See* Fed.R.Civ.P. 12(b); *Skyberg v. United Food & Commercial Workers Int'l Union*, 5 F. 3d 297, 302 fn. 2 (8th Cir. 1993). However, in addition to considering the Complaint and its attachments (there does not appear to be any declaration by Plaintiff attached as an Exhibit to the Complaint filed with this Court), the Court may consider matter that is properly the subject of judicial notice under Fed.R.Evid. 201 (such as orders in another action) without converting to a Rule 56 motion for summary judgment. *See MGIC Indem. Corp. v. Weisman*, 803 F. 2d 500, 504 (9th Cir. 1986); *Mack v. South Bay Beer Dist., Inc.*, 798 F. 2d 1279, 1282 (9th Cir. 1986); *Henson v. CGC Credit Servs.*, 29 F 3d 280, 284 (7th Cir. 1994). The Court may also consider the content of documents central to the case that are referenced in the Complaint without converting to a Rule 56 motion for summary judgment. *See* e.g. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F. 2d 429, 431 (7th Cir. 1993). The Court may disregard allegations in the Complaint that contradict facts which may be judicially noticed. *See Mullis v. United States Bank. St.*, 828 F. 2d 1385, 1388 (9th Cir. 1987). Likewise, the Court may disregard allegations that clearly contradict documents referenced in the Complaint. *See Durning v. First Boston Corp.*, 815 F. 2d 1265 (9th Cir. 1987).

2. The Alleged Wrongful Acts.

The seventy five page Second Amended Complaint alleges at length, in essence, the following categories of purported wrongful conduct by Defendants:

A. Actions During Or Before The June 27, 1995 Search (More Than One Year Prior To Filing The Complaint).

i. While attempting to confirm citizen complaints against Plaintiff, Deputy District Attorney Volpei (not a party here) told Defendant Humane Officer Cozat that Cozat could enter Plaintiff's garage; Plaintiff prevented Cozat's access. (This was allegedly disclosed to the Magistrate issuing the warrant). **The Court does not find this conduct to be actionable.**

ii. Defendant Humane Officer/Field Supervisor Boatman made false statements in her Affidavit used to obtain of [sic] a Search Warrant for Plaintiff's premises:

a. Boatman falsely indicated that citizen complainants stated that Brunette was selling cats that looked sick, with eyes matted shut and covered in flies and feces, and that cats showed signs of upper-respiratory disease, when in fact Plaintiff's cats were not in poor health, and Plaintiff had in fact advised that the kittens were too young to be released and their eyes had not yet opened. **This conduct may be actionable.**

b. Boatman reported that Plaintiff had not made veterinarian appointments for her cats as required in the Humane Society Notice of Correction, when plaintiff had in fact made such appointments and had advised Boatman of this. **This conduct may be actionable.**

c. Boatman failed to disclose to the Magistrate that the press would be invited to cover the search. **The Court believes this fact to be irrelevant to the warrant issuance process.**

iii. Pursuant to a long-standing policy, Defendant Humane Society invited the press to enter Plaintiff's premises in connection with the warrant search and to take photographs. (The warrant authorized seizure of sick, injured or dead animals and authorized photographs to be taken by the officers.) The entry and photographs by the media were for the media's own private purposes, done without Plaintiff's consent, and while Plaintiff was absent from the premises. **While the Court does not approve of the common practice of inviting the press to cover law enforcement searches, as this may impair a criminal defendant's ability to receive a fair trial, the Court does not find the media participation alleged here to rises [sic] to the level of tortious conduct or constitutional violation (see discussion below).**

iv. Officers exceeded the scope of the search warrant by seizing healthy animals. **This conduct may be actionable.**

B. Actions After The June 27, 1995 Search (Within One Year Prior To Filing The Complaint).

i. The media Defendants published potentially defamatory/private false and inflammatory articles and photos regarding the incident. **This conduct may be actionable.**

3. The Media Defendants' Challenges To The Second Amended Complaint.

A. All Section 1983 Claims relating to the search and seizure are timely.

Since 42 U.S.C. § 1983 does not specify its own limitations period, federal courts must adopt the appropriate state statute of limitations using the law of the state most connected to the litigation. 42 U.S. § 1988; *Usher v. City of Los Angeles*, 828 F.2d 556, 558 (9th Cir. 1987). In *Wilson v. Garcia*, 471 U.S. 261, 279 (1985), the Supreme Court held that Section 1983 claims should be invariably characterized as personal injury actions for determining which state statute of limitations should be borrowed under 42 U.S.C. § 1988. In California, the relevant statute of limitations period for a Section 1983 action brought in federal court is the one-year statute of limitations codified in California Code of Civil Procedure § 340(3). *Usher*, 828 F.2d at 558.

Allegations of continuing conspiracy do not preclude bar by the statute of limitations as to wrongful acts more than one year prior to filing of the Complaint. In the Ninth Circuit, accrual of a cause of action for conspiracy, for statute of limitations purposes, is according to the "last overt act doctrine. *See Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986). The "last overt act" doctrine

does not mean that the statute of limitations will not begin to run on *any* of the harmful acts of a continuing conspiracy until occurrence of the last harmful act of the conspiracy. *See Scherer v. Balkema, supra*, 840 F.2d at 440. ("Indeed, the logical extreme of Scherer's argument is that 'a conspiracy action could not be maintained – since no cause of action would have accrued – until it could be told with certainty that the final overt act in furtherance of the conspiracy had been committed' (citation omitted)". *Id.* at fn 7.). Rather, "the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff." *Id.* at 439. Thus the "last overt act doctrine" means that the statute of limitations runs from the *first* damaging act of the conspiracy, and separately from each additional damaging act thereafter. The later alleged defamatory publications, which do not appear to be time barred, do not revive the claims for taking of the photos.

i. <u>Plaintiff's Arrest Acts to Toll the Applicable Statute of Limitations.</u>

Defendants argue that Plaintiff was arrested subsequent to the alleged unlawful acts, and therefore the causes of action of which Plaintiff alleges accrued prior to her disability. Since the cause of action accrued prior to the disability, Defendants argue that the statute of limitations was not tolled, and Plaintiff's claims are therefore time-barred.

However, in Plaintiff's SAC she alleges that she was imprisoned on the day the Defendants unlawfully entered her home, and was thus under a "disability" under the California Civil Code. It is Plaintiff's contention that since

she was under a disability on the day the causes of action accrued, the statute of limitation was tolled for the period of time she was in custody. Plaintiff argues that since the statute was tolled, her claims are timely.

In the present case, Plaintiff alleges that while the search was continuing, and as Defendants Hoffman and Boatman were both transporting animals from Plaintiff's ranch, Plaintiff was arrested and advised that she was being arrested for violations of the Penal Code section 597t. *SAC* at ¶ 43. Plaintiff was first apprised of the unlawful search and seizure of her home at this point in time. It was this entry onto Plaintiff's premises that led to the filing of the Complaint. It is the Court's finding that Plaintiff was arrested *contemporaneously* with the alleged unlawful entry onto Plaintiff's ranch. Since Plaintiff was in custody as the injury was occurring, Plaintiff's causes of action were tolled until her release from jail. Section 357 of the Code of Civil Procedure provides that no person can avail himself of a "disability" such as imprisonment for purposes of a tolling statute "unless [the disability] existed when his right of action accrued." Cal. Civ. Proc. Code §357. Since Plaintiff was under a disability when the cause of action accrued, the Complaint is not barred by the statute of limitations. *See Elliot v. City of Union City*, 25 F.3d 800 (9th Cir. 1994).

B. The Media Defendants are Not State Actors.

The media Defendants claim there was no state action on their part. The Court agrees and Plaintiffs Fourth Amendment claim against the media Defendants should be dismissed on this basis. Section 1983

claims require state action. While the Humane Society Defendants were executing the Warrant, and thus acting in a quasi-law enforcement capacity, it is alleged that the "presence of the OVN Defendants was not for any law enforcement purpose. The OVN Defendants performed no law enforcement function related to the execution of the search warrant." SAC ¶ 27; 42. When the media is present during a search as a means of furthering its own news gathering interests, as alleged here, and is not alleged to have helped to obtain or execute the search warrant, it is not acting under color of state law and is not liable for violation of Section 1983. *See United States v. Miller*, 688 F. 2d 652, 657-658 (9th Cir. 1982); *United States v. Jennings*, 653 F. 2d 107, 110 (4th Cir. 1981); *Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996); *cert. denied*, ___ U.S. ___, 117 S.Ct. 1081, 137 L.Ed.2d 216 (1997). The *Parker* court found that the media defendant did not act under the "color of state law" based on several factors: (1) the news organization "acted independently of the police" in its decision to enter the house and videotape there, (2) the news organization and police did not assist each other in the performance of their respective duties, (3) the news organization did not execute the search warrant, (4) the news organization entered the house after the police did, (5) the news organization "was there for reasons of its own." *Parker*, 93 F.3d at 448. (If indeed the media defendants were acting under color or state law and assisting in execution of what appeared on its face to be a valid search Warrant permitting photographs, they may be immune. *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (1977), *U.S. Cert. Denied*, 431 U.S. 930; *Franks v. Delaware*, 438 U.S. 154 (1978).) There are no allegations that the Humane Society had anything to do with the OVN Defendants' subsequent publication of articles about the

execution of the Search Warrant or had any right to review the OVN Defendants' editorial choices, or to prevent the publications of articles concerning the execution of the warrant. There are no allegations that the media Defendants are "financial[ly] indispensab[le]" to the state or that there is a "significant financial integration between the state and the private actor." *Vincent v. Trend W. Technical Corp.*, 828 F.2d 563, 569 (9th Cir. 1987).

C. Plaintiff's Claim for Invasion of Privacy under the California Constitution is Dismissed.

The elements of a claim for violation of the state constitutional right to privacy are: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) conduct by defendant constituting a serious invasion of privacy interest. *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1, 34-35, 26 Cal.Rptr.2d 834, 856-57 (1994); *Shulman v. Group W Productions, Inc.*, 51 Cal.App.4th 850, 59 Cal.Rptr.2d 434, 447 (1996).

i. Acts Before And At The Time Of The Search.

Defendants assert that the presence of the media at Plaintiff's residence at the invitation of the officers executing the search warrant to cover a newsworthy event was protected by the First Amendment. **The Court agrees and dismissal is proper on this basis.** *See Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (1977), *U.S. Cert. Denied*, 431 U.S. 930 (newspaper not liable for trespass, invasion of privacy and infliction of emotional distress arising out of publication of photo of the charred

remains of plaintiff's deceased daughter on the floor of her bedroom after a fire; the media was invited by the fire marshall to photograph the investigation). Since the media Defendants were on the premises lawfully to investigate a matter of public concern, Plaintiff's claim for invasion of privacy must be dismissed.

D. Plaintiff's Claim for Conspiracy to Violate Fourth Amendment Rights and Invasion of Privacy Must Fail With the Underlying Claims.

A "civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another', and 'an overt act that results in damage.'. . . . The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended result. (citations omitted)" *Hampton v. Hanrahan*, 600 F.2d 600, 620-621 (7th Cir. 1979). See also *Rutledge v. Electric Hose & Rubber Co.*, 327 F.Supp. 1267, 1273-1274 (C.D.Cal. 1971).

Thus, for conspiracy liability, their [sic] are two types of acts which need to be shown, acts which show or further the agreement, and acts which actually inflict the agreed damage. *See Scherer v. Balkema, supra*, 840 F.2d at 442: "the agreement and the overt acts causing damage are separate components of a civil conspiracy."

Conspiracy is not actionable without an underlying wrongful act. *See 117 Sales Corp. v. Olsen*, 80 Cal.App.3d

645, 649 (1978); *Woodrum v. Woodward County, Okla.*, 866 F.2d 1121, 1126 (9th Cir. 1989). **Thus, the conspiracy allegations are dependent upon the survival of Plaintiff's Invasion of Privacy and Fourth Amendment claim.**

Even a private individual may conspire with state officials and be held liable as conspirators under Section 1983. *See* e.g., *Briley v. California*, 564 F 2d. 849, 858 (9th Cir. 1977); *Darr v. Wolfe*, 767 F.2d 79 (3rd Cir. 1985). While one may conspire with a private person to violate Section 1983, such conspiratorial acts must be alleged with particularity. *See Hayduk v. Lamma*, 775 F.2d 441, 443 fn. 1 (1st Cir. 1985); pleader must "allege with at least some degree of particularity overt acts which defendant engaged in which were reasonably related to the promotion of the claimed conspiracy." *See* also *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989): "To state a claim for a conspiracy to violate one's constitutional rights under section 1983, the plaintiff must state specific facts to support the existence of the claimed conspiracy"; *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984). **There are not sufficient allegations of any particular acts by the media Defendants in furtherance of the alleged search warrant activity that is recognized as improper by this Court (false statements regarding condition of animals and plaintiff's treatment in obtaining the warrant or seizure of healthy animals). For this additional reason, the media Defendants should be dismissed as conspirators from the Section 1983 claims. Moreover, since Plaintiff cannot maintain the claim for Invasion of Privacy for reasons stated supra, Plaintiff's conspiracy claim must also fail.**

E. Plaintiff's Trespass Claim is Dismissed.

Entry of the press to cover a newsworthy event with the consent of the officers serving a search warrant does not constitute a trespass. First, the officers serving the warrant had temporary control and possession of the property (and were themselves authorized by the warrant to take photographs), so the media did enter with consent of persons in lawful possession of the property. *See Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal.App.3d 1, 16-17 (1977). Moreover, this type of news coverage, while undesirable, appears to be a common practice in this jurisdiction and consent may be implied, particularly where, as here, there is no allegation that Plaintiff was present (and therefore could be no allegation that Plaintiff either mistook the media representatives for officer [sic] serving the warrant or that any request was made by Plaintiff for the media representatives to leave). *See* e.g.. *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (1977). *U.S. Cert. Denied*, 431 U.S. 930, (newspaper not liable for trespass since it was invited by the fire marshall). **Since the media Defendants had the consent of the Humane Society as well as the Sheriff, entities in temporary possession of Plaintiff's premises under the Warrant, they were present with consent of those in lawful possession of the property. Dismissal of the Fourth Cause of Action, is proper on this basis.**

F. Plaintiff's Emotional Distress Claims are Dismissed.

Plaintiff's claims for emotional distress are based upon Defendant's alleged trespass on the property of

Plaintiff, as well as the Defendants publishing alleged defamatory statements about the Plaintiff.

Plaintiff's claim for emotional distress based upon Defendants trespass must fail since the underlying trespass has been adjudicated lawful. As Defendant's entry onto Plaintiff's property was lawful, it cannot be extreme and outrageous, nor can it give rise to a claim for negligent infliction of emotional distress since Plaintiff was not even present when the allegedly unlawful entry occurred.

Plaintiff's claim for emotional distress based upon Defendants publication must also fail as being subsumed within the law of defamation. In *Grimes v. Carter*, 241 Cal. App. 2d 694, 702 (1966), the issue was whether a plaintiff who "bases her cause of action upon facts which constitute defamation . . . [could] bypass the [then-existing bond] requirement" in defamation cases by recasting her claim as one for infliction of emotional distress. The *Grimes* court stated, "In circumstances where a plaintiff states case of libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on a theory of a separate tort." *Id.* at 702.

In the present case, Plaintiff has attempted to state her defamation claim in terms of a tort for emotional distress. Conspicuously absent from the Plaintiff's Second Amended Complaint is a cause of action for defamation. The Court views this is an attempt to sidestep the defenses and privileges available in defamation actions of this kind. The Court's Order dismissing Plaintiff's First Amended Complaint was clear on the fact that Plaintiff's emotional distress claims will survive or fail with her

defamation claims. Accordingly, Plaintiff's claims for emotional distress are dismissed with prejudice and without leave to amend.

G. Plaintiff's Claim For Conversion is Dismissed.

The taking of photographs of a newsworthy event, as alleged here, does not amount to a property interest capable of conversion. *See* e.g. *Ault v. Hustler Magazine, Inc.*, 860 F. 2d 877, 883 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). **Dismissal of the Eighth Cause of Action, is granted on this basis.**

H. Plaintiffs Claim for Declaratory Relief is Dismissed.

Plaintiff appears to seek declarations that the completed conduct of Defendants prior to and in connection with the search and seizure was improper and actionable (and does not seek a declaration regarding future use of the photographs). Disputes with respect to activities that have been discontinued may be dismissed as moot. *See* e.g. *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015-1016. There is no "substantial likelihood that the past challenged . . . conduct will recur in the future." *Kruse v. State of Hawai'i*, 857 F.Supp. 741 (D.C. Haw. 1989) citing *Nelson v. King County*, 895 F.2d 1248, 1250 (1990) and *City of Los Angeles v. Lyons*, 461 U.S. 95, 108; *Sample v. Johnson*, 771 F.2d 1335, 1340 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986) (party seeking declaratory relief must show a "credible threat" that he/she will be subject to a specific injury for which injunctive relief is sought).

Moreover, given Plaintiffs monetary claims for such past conduct, declaratory relief is redundant and inappropriate here. *See Public Affairs Press v. Rickover*, 369 U.S. 111, 112 (1962); *Mitcheson v. Harris*, 955 F. 2d 235, 237 (1992); *Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984) (declaratory relief is appropriate when the judgment (1) will be useful in clarifying and settling the legal relations in issues and (2) will terminate and offer relief from uncertainty, insecurity, and controversy leading to the action.

Since Plaintiff has requested the same relief on the same grounds as in the First Amended Complaint, dismissal with prejudice is appropriate, without leave to amend.

I. Plaintiff's Request for an Injunction is Denied.

There appears to be no future actual or threatened harm here – there is no allegation that the media Defendants have threatened to republish the pictures.

Moreover, an injunction restraining the OVN Defendants from further publication of the "images" taken during the execution of the search warrant would appear, under the circumstances alleged here, to be an improper prior restraint of the media Defendants' First Amendment Rights. *See CBS, Inc. v. Davis*, 510 U.S. 1315, 127 L.Ed.2d 358, 361 (1994); *Sampson v. Murray*, 415 U.S. 61, 91 (1974); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). This motion is granted without leave to amend, and with prejudice.

4. The Humane Society Defendants challenges to the Second Amended Complaint.

A. Plaintiff's Complaint is not Barred by the Statute of Limitations.

As previously stated, the statute of limitations was tolled while Plaintiff was imprisoned since the cause of action accrued while she was in custody. The Humane Society Defendants argue however, that Government Code § 945.3 prevents Plaintiff from bringing a civil action against a public entity while a criminal action is pending. Government Code § 945.3 states in relevant part:

> "No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing the peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending . . .
>
> Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court."

Government Code § 945.3

Defendants cite *Mangels v. City of Orange et al*, 678 F. Supp. 1452 (C.D. Cal. 1988) for the proposition that Plaintiff's claim is fatally defective because the court in *Mangels* held that the tolling provision did not apply to Section 1983 actions. Defendants have omitted the fact that *Mangels* was overturned by the Ninth Circuit Court

of Appeals.[1] *See Harding v. Galceran*, 889 F.2d 906 (9th Cir. 1989). *Harding* overturned *Mangels* stating, "We hold that although section 945.3 may not prohibit a potential plaintiff from bringing a section 1983 action against a peace officer while criminal actions are pending, section 945.3's tolling provision may still apply to toll the limitations period while criminal actions are pending against the potential plaintiff." *Id.* at 908. Accordingly, Plaintiff Brunette may properly bring her section 1983 action even though there is criminal action pending against her at this time. *See also Union v. City of Union City*, 25 F.3d 800 (9th Cir. 1994).

Defendants' arguments that Plaintiff is prevented from pursuing her state law claims along with the federal claims are unavailing. Congress enacted 28 U.S.C. § 1367 granting federal courts discretion to exercise pendent jurisdiction to hear state law claims when they operate out of the same transaction or occurrence that give rise to the federal claims. Since Plaintiff's SAC alleges causes of action all stemming from the same nucleus of operative facts, this Court is inclined to grant pendent jurisdiction over the state law claims in an effort to prevent piecemeal litigation.

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[1] The Court notes that in state court this is a sanctionable offense for which there is no excuse; *Mangels* was overturned over eight years ago.

B. The Humane Society's Practice of Inviting the Media to Accompany the Execution of Search Warrants is not Actionable Per Se, Although Individual Defendants May be Held Liable for Actions Outside the Scope of the Warrant.

The act of allowing the media to cover a newsworthy search under a Warrant is not **per se** actionable conduct. The parties have not cited any binding authority holding that a state officer or agency that allows media representatives into a home to photograph and report for non-governmental news gathering purposes during the execution of a search warrant is in violation of the United States Constitution or engaged in tortious conduct.

This Court disagrees with the district court's conclusions in *Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D. N.Y. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1689 (1995), as they might apply to this case. In *Ayeni* a Secret Service agent invited a CBS television crew to be present during execution of a search warrant for evidence of credit card fraud; the media crew filmed against protest, a cowering mother in a dressing gown and her child who were not under investigation. No evidence of illegal activity (credit card fraud) was found. The district court denied dismissal of Section 1983 claims for unreasonable search and seizure of photographic images, as well as claims for invasion of privacy, trespass, and conversion. In *Ayeni* the Court noted that "CBS claims no First Amendment right to be present." Implication of freedom of the press was not addressed. *Also Anderson v. WROC-TV*, 441 N.Y.S. 2d 220 (1981) (action against humane society, officers and media representatives invited by those officers, who filmed home

during warrant search for mistreated animals despite the owner's protests; claim for trespass allowed).

This Court's reasoning, discussed below is similar. *See Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (1977), *U.S. Cert. Denied*, 431 U.S. 930 (newspaper not liable for trespass, invasion of privacy and infliction of emotional distress arising out of publication of photo of the charred remains of plaintiff's deceased daughter on the floor of her bedroom after a fire; the media was invited by the fire marshall to photograph the investigation); *Prahl v. Brosamle*, 98 Wis.2d 130 (1980) (the presence of the press does not render the search unreasonable); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979); *Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 516-20 (1986) (without demonstration that an independent unlawful act has occurred, the news gathering process is subject to First Amendment protection); *Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 534-36 (1971); *Kapellas v. Kofman*, 1 Cal.3d 20, 36 (1969); *Nicholson*, 177 Cal.App.3d at 516-20 (no claim for invasion of privacy can come from the publication of information about matters of public interest).

While this Court does not condone such cavalier activity by law enforcement officials and members of the press, since such tasteless press coverage may ultimately interfere with a criminal defendant's ability to receive a fair trial, the Court does not believe such activity standing alone, as alleged here, rises to the level of tortious or unconstitutional conduct. This reasoning does not, however, mean that the media can thereafter make inappropriate use of the photographs or publish defamatory articles with impunity. The latter conduct can in fact subject the media to other theories of liability.

The individual Humane Society Defendants argue at length that they acted under a valid search warrant and/or with probable cause with respect to all of their actions. *See, e.g., Cooleridge v. New Hampshire*, 403 U.S. 443 (1971); *Crowder v. Snyard*, 884 F.2d 804, 820 (1989) (" . . . where an officer comes across items not listed in the warrant, it would serve no identifiable interest to require him to call for outside help to ascertain the nature of the discovered item. . . . "). **However, the Second Amended Complaint alleges acts beyond proper warrant activity (e.g., the seizure of healthy animals beyond the scope of the Warrant). This states a violation of Section 1983 by the individual Humane Society officers, who participated in the activity.** Whether these allegations can ultimately be proved here is irrelevant. The Court cannot adjudicate the propriety of the individual Humane Society Defendants' actions at this time on this motion to dismiss. For purposes of the Motion, Plaintiff has stated a claim upon which relief may be granted.

However, the section 1983 claims against the Humane Society must be dismissed. As a quasi-public agency, it has no vicarious liability for the acts of its individual officers. In order to hold the organization liable, the plaintiff must state facts sufficient to establish an unconstitutional custom and practice. *Monell v. New York City Dept. Of Social Services*, 436 U.S. 694 (1978). There is no allegation indicating a Humane Society policy to falsify Affidavits for warrants or seize animals not covered by a warrant. **The Humane Society claims their invitation of the press while executing a search warrant is not an unconstitutional policy and practice (invasion of privacy; unreasonable**

search and seizure). Allowing media coverage of a newsworthy event, the warrant search here is not actionable. *See* e.g. *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (1977), *U.S. Cert. Denied*, 431 U.S. 930.

3. Plaintiff's Request for Declaratory Relief Has Been Denied.

The same analysis applies with regard to the Humane Society as was applied to the media Defendants with claims predicated on declaratory relief.

4. Conclusion.

For the reasons stated above, the media Defendants' motions to dismiss the Second Amended Complaint are **granted** without leave to amend, and with prejudice. The Humane Society's motion is **granted in part** with prejudice and without leave to amend and **denied in part**, as previously set forth.

IT IS SO ORDERED.

DATED: October 20, 2000

DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States
District Court

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-56730

GLENDA BRUNETTE

Plaintiff-Appellant.

vs.

THE OJAI PUBLISHING COMPANY, INC., d.b.a THE OJAI VALLEY NEWS, a corporation; TIM DEWAR, an individual.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

U.S.D.C. CV 96-04557-DT

APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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APPROPIATENESS OF REHEARING EN BANC

Pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 35-1, Petitioner Glenda Brunette ("Petitioner" or "Brunette"), plaintiff-appellant below, respectfully requests rehearing or rehearing en banc of the Panel's June 28, 2002 opinion affirming the granting of a motion to dismiss by defendants-appellees The Ojai Publishing Company, Inc. d/b/a/ *The Ojai Valley News* and journalist Tim Dewar ("Dewar") (collectively the "Media"), in order to secure or maintain uniformity of the application of the decisions of this Court and the United States Supreme Court. Pursuant to Fed. R. App. P. Rule 35(b), rehearing or rehearing en banc is requested on the grounds that:

1. The Panel's opinion was based on a misapprehension of the law and inconsistent with the authority of the United States Supreme Court and this Court in finding that the Media did not engage in "state action" for purposes of 42 U.S.C. §1983. The panel erroneously held that "state action" requires financial integration between the media and law enforcement or that law enforcement have editorial or executive control over the Media. The panel erroneously also held that "state action" requires that the Media be engaged in the law enforcement activity. On the contrary, it is when the media engages in private news gathering under the imprimatur of law enforcement authority that its conduct is unlawful "state action".

2. The Panel's opinion was also based on a misapprehension of material facts in finding that the Media did not engage in "state action" for purposes of §1983. By way of example, the Panel disregarded the fact that the Media

and law enforcement, here the Humane Society, admittedly did have a contract – a pre-existing oral agreement under which the Humane Society allowed the Media onto Petitioner's ranch and inside her home – concluded under a long-standing custom, policy and practice with the Humane Society regularly inviting the Media onto private property to photograph and publish accounts of the execution of search warrants. The Media would not have had access to Petitioner's private property, her home, without being invited onto the locked and remote property by the Humane Society. The Panel disregarded the fact that the Media and the Humane Society conferred mutual benefits upon each other in that the Media obtained direct access to tantalizing animal stories and, in return, favorably publicized the Humane Society's searches and seizures. There was substantial coordination between the Media and Humane Society in order to confer mutual benefits on each other.

Consideration by the full Court is necessary to secure and maintain uniformity of the decisions of this Court and the Supreme Court. That the Media was present on Petitioner's private property, admittedly by agreement with and facilitated by the Humane Society, admittedly under the imprimatur of a search warrant, admittedly to confer mutual benefits on each other, and admittedly for private, non-law enforcement purposes, is the precise type of conduct that the law is designed to prohibit and punish. *See Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *vacated and remanded by* 526 U.S. 808 (1999), *judgment reinstated by* 188 F.3d 1155 (9th Cir. 1999); *Wilson v. Layne*, 526 U.S. 603 (1999); *see also Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); Cal. Penal Code §1530.

The Panel decision erroneously holds that it is not a violation of the Fourth Amendment for law enforcement officers and the press to utilize a search warrant to enter private property and to permit invited press representatives to enter, search and photograph inside a private home. No greater derogation can be imagined of this Court's decision in *Berger*, the Supreme Court's decisions in *Hanlon v. Berger* and *Wilson v. Layne* and the Second Circuit Court of Appeal's decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *aff'g, Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994). Upholding this opinion will effectively revive the joint law enforcement and press conduct prohibited by the above-cited cases. The decision must be reviewed both because of its enormous significance in the jurisprudence of the Fourth Amendment and because it will immediately authorize a resumption of despicable unconstitutional invasions of personal privacy by the press and the police. The petition for rehearing or rehearing en banc should therefore be granted.

I. THE LAW AND FACTS MISAPPREHENDED OR MISAPPLIED BY THE PANEL

Petitioner Brunette respectfully requests Rehearing or Rehearing en banc due to the Panel's misapprehension of law and misapplication of facts:

A. THE PANEL MISAPPREHENDED THE LAW OF THE UNITED STATES SUPREME COURT AND THIS COURT THAT DO NOT REQUIRE A WRITTEN CONTRACT, FINANCIAL INTEGRATION OR JOINT LAW ENFORCEMENT ACTIVITY TO FIND PRIVATE PARTY "STATE ACTION" WHEN BASED ON AN AGREEMENT OR CONSPIRACY

B. THE PANEL MISAPPREHENDED THE FACTS IN FINDING THAT THERE WAS NO "STATE ACTION" EVEN THOUGH THE MEDIA ADMITTED HAVING AN AGREEMENT WITH THE HUMANE SOCIETY BASED ON A LONG-STANDING CUSTOM, POLICY AND PRACTICE TO JOIN HUMANE SOCIETY SEARCHES, THE MEDIA'S ACCESS ONTO PRIVATE PROPERTY WAS FACILITATED BY THE HUMANE SOCIETY UNDER THE IMPRIMATUR OF A SEARCH WARRANT, AND THE MEDIA'S ACCESS ONTO PRIVATE PROPERTY WAS IN EXCHANGE FOR PROVIDING THE HUMANE SOCIETY VALUABLE PUBLICITY

C. THE PANEL MISAPPREHENDED THE LAW OF THIS COURT, THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE CONSTITUTION THAT HOLDS THAT THE FOURTH AMENDMENT IS VIOLATED WHEN THE MEDIA EXPLOITS LAW ENFORCEMENT'S EXCLUSIVE RIGHT TO ENTER A PRIVATE HOME PURSUANT TO A SEARCH WARRANT AND ENTERS, SEARCHES AND SEIZES PRIVATE IMAGES BY MEANS OF PHOTOGRAPHY SOLELY FOR THE MEDIA'S OWN PURPOSES UNDER AN ORAL AGREEMENT BETWEEN THE MEDIA AND LAW ENFORCEMENT

D. THE PANEL'S MEMORANDUM DECISION CREATES A CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS IN *AYENI v. MOTTOLA* IN ERRONEOUSLY HOLDING THAT PHOTOGRAPHY IS NOT A "SEIZURE" UNDER THE FOURTH AMENDMENT

II. ARGUMENT

A. THE PANEL DECISION MISAPPREHENDED THE LAW AND FACTS

The key to determining "state action" is to examine the facts evidencing the *relationship* between the government actor and private party. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982). Indeed, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State with private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *Life Ins. Co. of N. America v. Reichardt*, 591 F.2d 499, 501 (9th Cir. 1979). To determine state action, the circumstances surrounding the alleged wrongdoing "must be examined in their totality." *Howerton*, 708 F.2d at 384.

Here, the Panel disregarded the fundamental test for determining "state action" which requires a factual examination of the relationship between the Media and Humane Society. Instead, the Panel *compared and contrasted* the relationships alleged here with the relationships alleged in *Hanlon v. Berger* and concluded that there was no state action here because the relationships in this case were more simple than in *Hanlon*. In noting that the conduct in *Hanlon* "was no ordinary search" because the "search [stood] out as one that at all times was intended to serve a major purpose other than law enforcement" (129 F.3d at 509), the Panel conducted a literal fact-by-fact comparison with *Hanlon*. That is not what the law requires. *See also Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) (recognizing that there is no specific test for determining state action) (citing *Melara v. Kennedy*, 541 F.2d 802, 805 (9th Cir. 1976)). Here, not only did the

Panel misapprehend the law, it misapplied, misstated or disregarded material facts alleged in the Complaint.

1. Joint Action Was Sufficiently Alleged

The Panel misapprehended the law when it disregarded the existence of an agreement between the Media and Humane Society. There was an admitted long-standing custom, policy and practice between the Humane Society and the Media – an agreement – to allow the latter to enter private property under the imprimatur of search warrants obtained by the Humane Society. Under that agreement, the Media entered Petitioner's private property and participated in the execution of a search warrant which it also photographed and publicized for the benefit of the Humane Society.[1] Excerpts of Record ("ER"): [tab] 1 [complaint] ¶¶27, 38-42, 50, 52-53, 58. The long-standing custom, policy and practice was an oral agreement; it was also a conspiracy; and it was state action. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-52 (1970); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Howerton*, 708 F.2d at 383. That there was a written agreement in *Berger* does not nullify the existence of the agreement here. *See Berger*, 188 F.3d at 1157. There was far more going on here than

[1] In June 1995, Petitioner was a 60-year-old widow living alone on an 11-acre ranch ("Ranch") in a rugged and hilly region in an unincorporated portion of Ojai along the Los Padres National Forest. ER:1 ¶¶23-24. Petitioner lived in Ojai for over 40 years where she and her husband raised their family. *Id.* ¶24. After her husband's untimely death, Petitioner started raising pedigreed cats as pets and occasionally sold cats or kittens as a hobby. *Id.* ¶¶63, 88, 130. Otherwise, she operated an avocado orchard on the Ranch and lived a quiet life. *Id.* ¶¶25, 130.

simply a "wink and a nod understanding" as the Panel characterized the conduct between the Media and Humane Society. *See* Opinion filed June 28, 2002 ("Op.") [at page] at 9308.

The Panel was also incorrect in finding that there was no state action because the Media was not engaged in any law enforcement purpose and acted independently. The Panel's interpretation of the law that the Media did not engage in state action because "the Media's actions were its own; they were not 'state actions' directed by or jointly conceived, facilitated or performed by the Humane Society" misapprehends the law. Op. at 9309. That the Media was present for its own commercial purposes and to provide publicity for the Humane Society establishes that they were unauthorized state actors and also supports their liability for constitutional violations. *See* Cal. Penal Code §1530; 28 U.S.C. §3105.[2] In *Berger*, this Court reversed dismissal of the complaint and held that state action and a constitutional violation were sufficiently alleged by facts showing that the media had an agreement and acted jointly with government agents to enter private property under the imprimatur of a warrant to record the warrant's execution for a non-law enforcement, private purpose. *See* ER:1 ¶¶39, 42, 50, 65-75.[3] It is the presence of

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[2] California Penal Code section 1530 prohibits the service of search warrants except by "any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution." The federal equivalent is [sic] 28 U.S.C. §3105, is virtually identical.

[3] *See Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994) (Secret Service agents who allowed camera crew into private

(Continued on following page)

private state actors for *non*-law enforcement purposes that forms the constitutional violation.[4]

The Panel misapprehended the law in interpreting *Wilson v. Layne*, 526 U.S. 603 (1999), to stand for the proposition that only law enforcement violate the Fourth Amendment when they invite the media onto private property. A unanimous Supreme Court held in *Wilson* that,

> Even though such actions might violate the Fourth Amendment, if the police are lawfully present, the violation of the Fourth Amendment is the *presence of the media* and not the presence of the police in the home.

Id. at 614 n.2 (emphasis added).

The Panel also disregarded this Court's reliance in *Berger* on Chief Judge Newman's opinion and District Judge Weinstein's opinion in *Ayeni v. Mottola*, 35 F.3d 680

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apartment violated Fourth Amendment and 28 U.S.C. §3105); *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (allowing company employee onto private property to search for stolen company property implicates Fourth Amendment).

[4] Media conduct independent of law enforcement is a legally erroneous basis to reject finding state action. The Eighth Circuit in *Parker v. Boyer*, 93 F.3rd 445 (8th Cir. 1996), was wrong as a matter of law to find that there was no state action based on the media's independence and because the media was not assisted by the police. On the contrary, but for the invitation and pre-arranged plan with the police, the media would not have known about the pending search and would not have been able to enter the house. Petitioner submits that *Parker* is legally deficient and wrong and the Panel's reliance on *Parker* is misplaced particularly where, as here, the Media and Humane Society had a long-standing agreement to enter property under the imprimatur of search warrants for mutual gain.

(2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) and *Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994). In affirming the district court's finding that the Fourth Amendment was violated when Secret Service agents invited a CBS camera crew to film the execution of a search warrant for a television show, the Second Circuit also found a breach of trust by both agents and the media when they turned a private home into a "soundstage for law enforcement theatricals." *See Ayeni v. Mottola*, 35 F.3d at 686; *see also United States v. Sanusi*, 813 F. Supp. 149, 158-161 (E.D.N.Y. 1992).[5] The Media's use of the Humane Society's search warrant to enter Petitioner's Ranch for commercial purposes was not reasonable, violated the Fourth Amendment and constituted trespass and conspiracy. Their conduct was state action.

2. Symbiotic Relationship Was Sufficiently Alleged

Under an alternative theory of state action, the Panel also misapprehended the law by finding that because there was no financial integration between the Media and Humane Society, there was no state action. Op. at 9310-11. Financial integration is not the only form of a "symbiotic relationship". Such a relationship is formed when a private party and the Government confer "mutual benefits" on each other. *See Dobyns v. E-Systems, Inc.*, 667 F.2d

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[5] *See also Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (advising that "the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant. . . . ")

1219, 1222 (5th Cir. 1982). The Panel's factual discussion was erroneous when it stated that the Humane Society was funded by the State. On the contrary, the purpose of the Media's invitation to join the Humane Society search was to confer mutual benefits on each other: a story in return for favorable publicity, valuable for its own sake and to use in soliciting donations for the Humane Society. ER:1 ¶¶27, 60, 61, 133. For the purposes of showing that the Media and the Humane Society were joint participants in a plan that would deny Petitioner her Consitutional rights, it is not necessary to prove that the Media and the Humane Society knew the details of the plan so long as they shared a common objective. *See United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989). June 27, 1995 was just another in a series of joint photo opportunities for the Media and the Humane Society. ER:1 ¶¶27, 60.

That the Panel found that the Humane Society had no editorial or executive control over the Media is irrelevant. Op. at 9311. The federal officers in *Berger* had no control over CNN; nor did the Secret Service agents in *Ayeni* have any control over CBS. Indeed, the facts show that prior to executing the warrant at Petitioner's Ranch, the Humane Society had already invited both the Media and KADY television onto the ranch and into Mrs. Brunette's home. ER:1 ¶39. Humane officers even tried to delay the search to accommodate the Ojai Valley News reporter's schedule. *Id.* The Panel found this fact not to be important. On the contrary, it supports Petitioner's allegation that the Media and Humane Society acted under a pre-arranged plan pursuant to an agreement and conspiracy for their mutual benefit. This was state action.

3. Public Function Was Sufficiently Alleged

The Panel misapprehended the law and misapplied the facts in concluding that because the Media acted "independently" of the Humane Society, they were not state actors under the public function analysis. Op. at 9311-12. State action also exists under the "public function" theory by the "assumption by private parties of governmental powers" or the "delegation by the state of powers 'traditionally exclusively reserved to the State.'" *See Dobyns*, 667 F.2d at 1223; *see, e.g., Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978).

Here, the Media cloaked themselves with the authority of the State to enter Petitioner's private property under the imprimatur of the search warrant. The Media assumed the authority of the Humane Society. The Media gained access onto Petitioner's private ranch and inside of her home by virtue of this authority. The Media assumed governmental authority and, but for assuming this authority which is traditionally exlusively reserved to the State, the Media would not have had access onto Petitioner's private property during the execution of the search warrant. The Media did not act "independently" – the reporter entered, searched and photographed pursuant to the invitation and agreement of those executing the warrant. The assumption of authority was state action.

4. The Panel's Finding That Media Photography For Non-Law Enforcement Purposes Is Not An Unlawful Conversion Is In Conflict With The Second Circuit And State Law

In its unpublished memorandum opinion, the Panel affirmed the district court's dismissal of Petitioner's

conversion claim and held that a photographic image is not the subject of an unlawful conversion. Mem. at 5. The Panel reasoned that "[c]ourts have traditionally refused to recognize conversion of intangible assets that are not merged with something tangible [citation omitted]." *Id.*

Petitioner respectfully submits that under the juxtaposition of the law of conversion with a Fourth Amendment analysis, the unauthorized photography of private images constitutes an unlawful seizure and the reproduction of those images constitutes an unlawful conversion of an intangible image into a tangible photographic print. ER:4 p. 174-75; ER:9 p. 291.

California law recognizes a property right in private images taken during the exeution of search warrants. *See Oziel v. Superior Court*, 223 Cal. App. 3d 1284, 1292 n.6, 273 Cal. Rptr. 196, 200 n.6 (1990) (videotaped images taken in home constituted property "seized" under warrant) (citing *People v. Matteo*, 127 Misc. 2d 112 (N.Y.S. 1985) (photographing constitutes seizure of intangible images of property). *See also United States v. Taketa*, 923 F.2d 665, 675-77 (9th Cir. 1991) (videotape obtained without warrant violated Fourth Amendment); *United States v. Silverman*, 365 U.S. 505, 511 (1961) (eavesdropping through trespass violates Fourth Amendment). Under conversion and Fourth Amendment analyses, the Media wrongfully seized and converted Petitioner's private images for their own use.

Federal law also recognizes a Fourth Amendment right in private images. In affirming the district court's finding that the videotaping of the search by CBS in *Ayeni* constituted an unlawful "seizure", the Second Circuit held:

> The video and sound recordings were unnecessary to the purposes of the search – to discover materials related to an alleged credit card scheme. . . . Instead, the purpose of the TV crew's intrusion into the Ayeni home was to seize images and sounds of the Ayeni home, and of the Ayenis themselves, that were intended for public viewing by television audiences across the country. We agree with the district court that the video and sound recordings were "seizures" under the Fourth Amendment and rendered the search far more intrusive than it needed to be.

Ayeni v. Mottola, 35 F.3d at 688 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967) ("the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements" [citations omitted].)

The videotaping by CBS was found even more despicable because, like here, the search included a search for documents, to which the Second Circuit noted:

> The pending case vividly illustrates how a search for documents can lead to the inspection of highly personal items unrelated to the search. Here the intrusiveness of such inspection was aggravated by the fact that the needless viewing of private documents was done not only by agents conducting the search but also by unauthorized persons with no business being in the home at all.

35 F.3d at 688.

The Media's photography of private images on Petitioner's private property constituted an unlawful "seizure." The elements of conversion are met: (1) ownership or right to possession of property, (2) wrongful disposition of the

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property right of another, and (3) damages. *Don King Productions/Kingvision v. Lovato*, 911 F. Supp. 419, 423 (N.D. Cal. 1995). Petitioner had an undisputed ownership and possessory right in her Ranch and its contents. (ER1: ¶¶162-163). The Media wrongfully entered and asserted control over Petitioner's private property under the imprimatur of the warrant, proceeded to photograph and otherwise record images of Petitioner's private property and contents, and obtained confidential information about Petitioner and her privacy, which were "merged" or developed into photographs and written articles about Petitioner that were published. (ER1: ¶¶164-165), which damaged Petitioner. ER1: ¶¶166-168.

The District Court's finding in *Ayeni* that CBS engaged in the unlawful seizure of private images applies here to a conversion analysis:

> CBS had no greater right than that of a thief to be in the home, to "capture" the scene of the search on film and to remove the photographic record. The images, though created by the camera, are a part of the household; they could not be removed without permission of official right.

Ayeni v. CBS Inc., 848 F. Supp. at 368. For the foregoing reasons, the Panel's affirmance of the dismissal of the conversion claim should be reversed.

III. CONCLUSION

For the foregoing reasons, Petitioner Glenda Brunette respectfully requests that the Panel grant rehearing or rehearing en banc.

DATED: July 18, 2002

RESPECTFULLY SUBMITTED,
Henry H. Rossbacher
Nanci E. Nishimura

/s/ Henry H. Rossbacher
Henry H. Rossbacher

Rossbacher & Associates
Counsel for Petitioner
Glenda Brunette

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(B), the undersigned counsel certifies that the Petition for Rehearing and Rehearing En Banc is proportionally spaced, has a typeface equivalent to 10(cpi) points or more (Courier in WordPerfect 5.1) and contains no more than 3,770 words.

DATED: July 18, 2002

RESPECTFULLY SUBMITTED,
Henry H. Rossbacher
Nanci E. Nishimura

/s/ Henry H. Rossbacher
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Glenda Brunette

STATEMENT OF INTERESTED PARTIES

The undersigned counsel hereby certifies that, to the best of his knowledge, the parties known to be interested in this matter are limited to Petitioner and her counsel and the other defendants-appellees and their counsel on the service list herein.

DATED: July 18, 2002

RESPECTFULLY SUBMITTED,
Henry H. Rossbacher
Nanci E. Nishimura

/s/ Henry H. Rossbacher
Henry H. Rossbacher

Rossbacher & Associates
Counsel for Petitioner
Glenda Brunette

PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is: 811 Wilshire Blvd., Suite 1650, Los Angeles, CA 90017.

On July 18, 2002, I served the foregoing document described as **APPELLANT'S PETITION FOR RE-HEARING WITH SUGGESTION FOR REHEARING**

EN BANC on the interested parties in this action by placing [ ] the original [x] a true copy thereof enclosed in a sealed envelope addressed as follows:

COUNSEL FOR DEFENDANTS

Kelli L. Sager
Mary H. Haas
DAVIS, WRIGHT, TREMAINE LLP
865 South Figueroa Street, Suite 2400
Los Angeles, CA 90017
Telephone: 213/633-6800
Facsimile: 213/633-6813

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 18, 2002, at Los Angeles, California.

/s/ Tina Walling
Tina Walling